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CONFIDENTIAL SETTLEMENT COMMUNICATION
SUBMITTED UNDER FRE 408
NOT ADMISSIBLE IN EVIDENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and STATE OF IDAHO Plaintiffs, v. UNION PACIFIC RAILROAD COMPANY and BNSF RAILWAY COMPANY, Defendants.	CIVIL ACTION NO. 10-2009-0082

912322.2

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 and 9607, and Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Wallace Yard and Spur Lines Site ("the Site") in Shoshone County, Idaho, together with accrued interest; and (2) performance or funding of response work by the defendants at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Idaho (the "State") on October 1, 2008, of negotiations with potentially responsible parties regarding the implementation of the response action design and response action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. The State has also filed a complaint against the defendants in this Court alleging that the defendants are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, the Hazardous Waste Management Act ("HWMA"), Idaho Code Section 39-4401, *et. seq.*, and the Environmental Protection and Health Act ("EPHA") Idaho Code Section 39-101 *et. seq.*, for: (1) reimbursement of costs incurred by the Idaho Department of Environmental Quality for response actions at the Site, and (2) performance or funding of response work by the defendants at the Site.

E. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the U.S. Department of the Interior and the U.S. Department of Agriculture on October 1, 2008, of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship and encouraged the trustee to participate in the negotiation of this Consent Decree.

F. During the period from 1994 to 1999, the Silver Valley Natural Resource Trustees conducted removals of historic mine wastes at the Site, specifically in several sections of the floodplain in both Ninemile Creek and the East Fork of Ninemile Creek, in the floodplain along five and one-half miles of Canyon Creek, and in portions of the former rail bed along Woodland Park and the Star-Hecla tailings ponds.

G. Defendant Union Pacific Railroad Company ("Union Pacific" or "UPRR") is a party to: (1) a consent decree entered September 12, 1995, in *United States, et al. v. Union*

K. The decision by EPA on the response actions to be implemented at the Site is embodied in a final Action Memorandum ("Action Memo"), signed by EPA on March 6, 2008. EPA has determined that the response actions described in the Action Memo and required by this Consent Decree are consistent with "The Bunker Hill Mining and Metallurgical Complex Operable Unit 3 Record of Decision" (September 2002) (the "ROD"). The Action Memo includes a responsiveness summary to the public comments. A copy of the Action Memo is attached as Appendix A.

L. Beginning in 2002, EPA and the State have implemented the preferred alternative Soil Alternative 4 pursuant to the ROD. Pursuant to this and consistent with the Cooperative Agreement for Remedial Action RACA V-970907-01-6, between EPA and the State, the State conducts testing and, if needed, remediation of properties within the Coeur d'Alene Basin. For purposes of the remainder of this Consent Decree, the State's implementation of this portion of the remedy will be referred to as the Basin Property Remediation Program or "BPRP." To the extent that the BPRP has been or will be implemented on properties subject to the actions identified in the EE/CA and selected in the Action Memo, it is incorporated in this Consent Decree as an activity to be conducted by the State and funded by the Settling Defendants pursuant to Paragraph 11 of this Consent Decree.

M. Based on the information presently available to them, EPA and the State believe that the Work will be properly and promptly conducted or funded by the Settling Defendants if conducted or funded in accordance with the requirements of this Consent Decree and its appendices.

N. Solely for the purposes of CERCLA Section 113(j), the response actions selected by the Action Memo and the Work to be performed or funded by the Settling Defendants shall constitute a response action taken or ordered by the President.

O. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaints, Settling Defendants waive all objections and defenses

"Basin ICP" shall mean the institutional controls program defined by regulations at IDAPA 41.01.01 for the Bunker Hill Superfund Site Operable Unit 3 Institutional Controls Administrative Area, administered by the Panhandle Health Department. The Basin ICP generally includes: (a) general prohibitions on digging or other actions that would diminish the integrity of soil, gravel, vegetated or asphalt barriers placed as part of the Response Action or the BPRP; (b) written instructions for future, physical actions (e.g., construction, landscaping, maintenance) with potential to impair barriers constructed as part of the Response Action or the BPRP; and (c) enforcement authorities.

"Bunker Hill Area of Drilling Concern" shall mean the institutional control program defined by the Idaho Department of Water Resources pursuant to IDAPA 37.03.09.040. ← should be 37.03.09.040

"Canyon Creek" shall mean the former Northern Pacific Railway (NPRy) spur line right-of-way in the Canyon Creek drainage extending from mile marker 0 at the former Wallace-Mullan Branch to approximate mile marker 6.75 near Burke, and the former Washington and Idaho Railroad (WIRR) spur line right-of-way also in the Canyon Creek drainage extending from mile marker 0 at the former Wallace-Mullan Branch to approximate mile marker 7.25 near Burke.

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

"Coeur d'Alene Basin Environment" shall mean: (1) the watershed of the South Fork and the North Fork of the Coeur d'Alene River, the main stem of the Coeur d'Alene River and its floodplain, including the lateral lakes and associated wetlands, and Lake Coeur d'Alene; (2) the Wallace-Mullan Branch Right-of-Way and all current or historical branches, sidings, spur lines, bridges and structures thereon or connected thereto that are within or adjacent to the area described in subpart (1) of this definition; and (3) all staging areas, Waste Material handling, storage or disposal areas, and other areas used or to be used by Settling Defendants in connection with performance of the Work as described in the statement of work attached to the consent decree entered on August 25, 2000 in *United States, et al. v. Union Pacific Railroad Co.*, Case No. CV 99-606-N-EJL, United States District Court, District of Idaho, and *Coeur d'Alene Tribe v. Union Pacific Railroad Co., et al.*, Case No. CV 91-0342-N-EJL, United States District Court, District of Idaho. The geographic extent of this definition also includes any staging areas, Waste Material handling, storage or disposal areas, and other areas to be used by Settling Defendants in connection with performance of the Work as described in the SOW attached hereto, as well as all staging areas, Waste Material handling, storage or disposal areas, and other areas to be used by the State in connection with implementation of the BPRP on former railroad rights-of-way within residential yard areas at the Site.

"Consent Decree" shall mean this Decree and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Decree and any appendix, this Decree shall control.

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working Day" shall mean a day other than a Saturday, Sunday, or a state or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or a state or Federal holiday, the period shall run until the close of business of the next working day.

"DEQ" shall mean the Idaho Department of Environmental Quality and any successor departments or agencies of the State.

"Engineering Evaluation/Cost Analysis" or "EE/CA" shall mean the EPA engineering evaluation/cost analysis report for the CERCLA response action for the Site, issued by EPA in March 2008, and including all attachments and appendices thereto. The EE/CA is attached to this Decree as Appendix B.

"Effective Date" shall be the effective date of this Consent Decree as provided in Paragraph 108.

"Element of Work" or "Elements of Work" shall mean one or more of the (1) Wallace Yard Element of Work, (2) Hercules Mill Site Element of Work, (3) Ninemile Element of Work, and (4) Canyon Creek Element of Work, all specified in the SOW attached hereto.

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"Functional Right of Way Width" or "FROWW" shall mean that portion of the former railroad right-of-way width that is generally accessible by humans and therefore represents an area of probable exposure through direct contact with Mine Waste. For example, ~~Examples of~~ FROWW will generally not include the following areas:

- a steep (generally steeper than 2H:1V) slope, cut or hillside;
- a water body;
- dense wooded or hostile vegetation;
- bedrock at the surface;
- surface material that is predominantly rock particles greater than 6 inches in diameter;
- a paved road (exclusive of road shoulders or unpaved roads);
- railroad embankment slopes, on the river or creek side, from the top of slope down to the edge of the water;
- areas that are seasonally submerged;

- areas covered with vegetation that is sufficiently dense to preclude easy access to the area; and/or
- other limitations approved by EPA.

"Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States or the State incurs in connection with the Site in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII (Remedy Review), IX (Access and Institutional Controls) (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV (Emergency Response), and Paragraph 91 of Section XXI (Work Takeover). Future Response Costs shall include costs to be incurred by EPA associated with the State's implementation of the BPRP within the Site. Future Response Costs shall also include all Interim Response Costs, and all Interest on those Past Response Costs Settling Defendants have agreed to reimburse under this Consent Decree that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from January 13, 2009, to the date of entry of this Consent Decree.

"Hercules Mill Site" shall mean the area depicted on Figure 3-1 of the EE/CA.

"Holidays" shall mean days when the offices of the State or Federal Government are closed for normal business.

"Hostile Vegetation" shall mean vegetation that either: (i) ~~is specified as such within the Project Material and Placement Specifications, Attachment D to the SOW; (ii)~~ forms a dense coverage; or (~~iii~~) contains brambles, vines, thorns, or other attributes that discourage human passage.

"Interim Response Costs" shall mean all costs, including direct and indirect costs, (a) paid by the United States or the State in connection with the Site between January 13, 2009 and the Effective Date, or (b) incurred prior to the Effective Date but paid after that date.

"Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

"Maintenance and Repair" or "M&R" shall mean all activities required to maintain the effectiveness of the Response Action in Wallace Yard and the Hercules Mill Site as required

under the Maintenance and Repair Plan approved by EPA pursuant to this Consent Decree and the Statement of Work.

"Matters Addressed" in this Consent Decree shall mean all Work under this Decree, all response actions taken or to be taken, and all response costs incurred or to be incurred by the United States, the State, or any other person or entity relating to the presence of Waste Materials at, or the release or threatened release of Waste Materials from the Site. "Matters Addressed" in this Decree do not include those response costs or response actions as to which the Plaintiffs have reserved their rights under this Decree (except for claims for failure to comply with this Decree), in the event that a Plaintiff asserts rights against Settling Defendants within the scope of such reservations.

"Mine Waste" shall include jig and flotation tailings, mine waste rock, ores, and ore concentrates, all of which are derived from mining activities.

"National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to CERCLA Section 105, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

"Ninemile" shall mean the former Northern Pacific Railway (NPRy) spur line right-of-way running in Ninemile Canyon from mile marker 0 at the former Wallace-Mullan Branch to mile marker 4.75.

"Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

"Parties" shall mean the United States, the State of Idaho, and the Settling Defendants.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States or State paid at or in connection with the Site through January 13, 2009, for the United States ~~and through **[insert date]** for the State~~. Such costs shall include, without limitation, costs incurred by EPA or DEQ for oversight of work under the Wallace Yard and Spur Lines Administrative Order on Consent, Docket No. 10-2002-0138, and completion of the EE/CA; costs incurred by EPA or DEQ for response work completed in connection with the Spur Lines; and Interest on all such costs which has accrued pursuant to 42 U.S.C. § 9607(a) through such date.

"Performance Standards" shall mean the cleanup standards and other measures of achievement of the goals of the BPRP and the Response Action as set forth in the documentation for that program and the SOW, respectively.

"Plaintiffs" shall mean the United States and the State of Idaho.

Cliff - The State did not have past costs. Should this be changed to say that?

"Real Property" shall mean any real property, portion of any real property, or interest in any real property that is located within the Site or other areas within the Coeur d'Alene Basin Environment where hazardous substances have come to be located or which is necessary for implementation of the Response Action.

"RCRA" shall mean the Resource Conservation and Recovery Act, as amending the Solid Waste Disposal Act, 42 U.S.C. §§ 6901 *et seq.*

"Response Action" shall mean those activities to be undertaken by the Settling Defendants to implement the Action Memo in accordance with the SOW and the final Response Action Design and Response Action Work Plans and other plans approved by EPA. "Response Action" does not include State implementation of the BPRP on former railroad rights-of-way within residential yard areas at the Site or the Settling Defendants' commitment to fund State implementation of the BPRP in those areas.

"Response Action Work Plan" or "RA Work Plan" shall mean the document developed pursuant to Paragraph 13 of this Consent Decree and approved by EPA, and any amendments thereto.

"Response Action Design" or "RAD" shall mean the final plans and specifications for the Response Action to be performed by the Settling Defendants, specifically the Response Action Design Drawings and Project Material and Placement Specifications – Attachments C and D to the SOW.

"Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

"Settling Defendants" shall mean Union Pacific Railroad Company and BNSF Railway Company.

"Site" or "Wallace Yard and Spur Lines Site" shall mean: (1) the Wallace Yard, (2) the Hercules Mill Site, and (3) the Spur Lines. The geographic scope of the Site is depicted generally on Figures 1-1 and 1-2 of the EE/CA, copies of which are attached as Appendix C. For purposes of the covenants not to sue in Section XXI (Covenants Not to Sue by Plaintiffs), the Site consists of the full geographic extent of the Wallace Yard, the Hercules Mill Site and the Spur Lines including but not limited to: (i) those areas identified in the SOW as being a part of the Work; (ii) those areas in the Ninemile Creek, East Fork of Ninemile Creek and Canyon Creek drainages where the Silver Valley Natural Resources Trustees previously conducted removals; (iii) former railroad rights-of-way within residential yard areas remediated or to be remediated under the BPRP; and (iv) the 26-foot wide corridor centered on the former main line of the Wallace-Mullan Branch which is now part of the Trail of the Coeur d'Alenes and was previously remediated by Union Pacific under the consent decree entered on August 25, 2000 in *United States, et al. v. Union Pacific Railroad Co.*, Case No. 99-0606-N-EJL, and *Coeur d'Alene*

of CERCLA

"Wallace-Mullan Branch Special Account" shall mean the special account established by EPA for (1) the Site pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. §9622(b)(3), and (2) Consent Decree Case No. 99-606-N-EJL (Aug. 25, 2000) and First Non-Material Modification (Oct. 20, 2000).

"Waste Material" shall mean (1) Mine Waste; (2) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (3) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (4) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); (5) any hazardous waste under Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), or hazardous constituent under 40 C.F.R. 266.10; and (6) any "hazardous material," "hazardous waste," "solid waste" or "toxic" material under applicable Federal or state law.

"Work" shall mean all activities Settling Defendants are required to fund or perform under this Consent Decree, including but not limited to any activities described in the SOW and funding of the State's implementation of the BPRP on former railroad rights-of-way within residential yard areas at the Site. "Work" excludes those activities required by Section XVI (Payments for Response Costs) and Section XXV (Retention of Records).

V. GENERAL PROVISIONS

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the funding, or the design and implementation, by the Settling Defendants, of response actions at the Site as identified in the EE/CA and the Action Memo in accordance with the SOW, to reimburse response costs of the Plaintiffs, and to resolve the claims of Plaintiffs against Settling Defendants as provided in this Consent Decree.

6. Commitments by Settling Defendants.

a. Settling Defendants shall fund their pro-rata share of the State's performance of the BPRP on properties through which former railroad rights-of-way occur within the Site and perform the remainder of the Work in accordance with this Consent Decree, the SOW, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Settling Defendants and approved by EPA pursuant to this Consent Decree. Settling Defendants shall also reimburse the United States and the State for Past Response Costs and Future Response Costs as provided in this Consent Decree.

b. The obligations of Settling Defendants to fund the State's performance of the BPRP on former railroad rights-of-way within residential yard areas at the Site and to perform the remainder of the Work and to pay amounts owed the United States and the State under this Consent Decree are joint and several. In the event of the insolvency or other failure of

formerly existed, DEQ shall provide Settling Defendants a "construction drawing" depicting the property and specifying those areas within the property determined by the DEQ to be within the FROWW and for which DEQ plans to charge Settling Defendants.

b. Within ninety (90) days of conclusion of the construction season for each year (December 31), DEQ will provide Settling Defendants' Project Coordinator with three (3) copies of "record drawings" and field reports, as they are completed and submitted to EPA, showing the completed work and documenting the areal extent of remedial action to be charged to each Settling Defendant.

c. Within ninety (90) days of conclusion of the construction season for each year (December 31), DEQ shall provide the Settling Defendants' Project Coordinator with three (3) copies of a report detailing the items included in, and the amount of, the BPRP unit cost for the just concluded construction season. At the same time, DEQ shall provide each Settling Defendant with a report for its share of the cost of the BPRP work implemented on the former Spur Line railroad rights-of-way during the just concluded construction season. The report will separately list each property on which remedial action was completed. For each property, the report will provide the total area remediated, the portion of the remediated area charged to a Settling Defendant, the unit cost, the total cost, and the portion of the total cost to be charged to a Settling Defendant as response costs under CERCLA ("BPRP Costs").

d. DEQ shall maintain and make available upon request to the Settling Defendants all information and data compiled during design and construction supporting DEQ's determination of the BPRP Costs that each Settling Defendant is charged and the unit cost for each construction season.

e. Settling Defendants shall reimburse EPA for BPRP Costs according to the Schedule stated in Paragraph 57.a of this Consent Decree. A Settling Defendant may object to all or part of a bill including BPRP Costs on the grounds stated in Paragraph 58 and by following the procedures in that Paragraph.

f. *Areas Excluded from BPRP Funding.* For purposes of this Paragraph 11, Settling Defendants' obligation to reimburse response costs incurred under the BPRP does not include costs incurred for work performed by DEQ or EPA in the areas outside the scope of the Action Memo and EE/CA. These areas include, but may not be limited to:

- Segments of the former WIRR right-of-way where the Silver Valley Natural Resource Trustees removed the rail bed embankment, including the segments from Mile Marker ("MM") 0.85 to MM 3.25;

- Paved public roads and shoulder areas along those roads where the paved road coincides with the former WIRR right-of-way and the former rail bed embankment is no longer visible. These paved public road areas include MM 5.06 to MM 5.70.

- The segment from MM 4.4 to MM 4.9 of the former NPRy Canyon Creek right-of-way where the rail bed is no longer visible;

- The former Hecla Mill area segment from MM 6.3 to the end of the former NPRy Canyon Creek right-of-way;

- The segment from MM 2.25 to MM 2.6 of the former NPRy Ninemile right-of-way where the rail bed is heavily vegetated; and

- The segment from MM 3.8 to the end of the former NPRy Ninemile right-of-way where the rail bed is not accessible.

Settling Defendants' funding obligations do not include costs incurred for removal of any abandoned vehicles or equipment that may be found on the former railroad right-of-way area. If DEQ determines that such debris should be removed before it performs work under the BPRP, then it will look to the current owner of the property for removal.

12. Response Action Design. Attached to the Statement of Work as Attachments C and D are the drawings and specifications which constitute the design of the Response Action at the Site ("Response Action Design" or "RAD"). The Response Action Design provides the design of the response actions (other than those included in the BPRP for former railroad rights-of-way within residential yard areas at the Site) set forth in the EE/CA and the Action Memo, in accordance with the SOW and for achievement of the Performance Standards and other requirements set forth in the Action Memo, this Consent Decree and/or the SOW. The RAD is incorporated into and enforceable under this Consent Decree.

13. Response Action Work Plan.

a. Attached to the Statement of Work as Attachment B is the work plan for the performance of the Response Action (the "Response Action Work Plan" or the "RA Work Plan"). The RA Work Plan provides for construction and implementation of the specific response actions set forth in the EE/CA and the Action Memo that the Settling Defendants will perform and, for those response actions, achievement of the Performance Standards in accordance with this Consent Decree, the Action Memo, the SOW, and the design plans and specifications provided in the RAD. The RA Work Plan shall be incorporated into and become enforceable under this Consent Decree. Within 7 days after entry of this Consent Decree, Settling Defendants shall submit to EPA and the State a Health and Safety Plan for field

Seven (7)

activities required by the RA Work Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The RA Work Plan includes the following: (1) schedule for completion of the Response Action; (2) method for selection of the contractor; (3) schedule for developing and submitting other required plans for the Response Action; (4) methods for satisfying permitting requirements; (5) methodology for implementation of the Contingency Plan; (6) tentative formulation of the Settling Defendants' Response Action team; and (7) procedures and plans for the decontamination of equipment and the disposal of contaminated materials. The RA Work Plan also includes the methodology for implementation of the Quality Assurance Project Plan and identifies the initial formulation of the Settling Defendants' RA Project Team (including, but not limited to, the Supervising Contractor).

c. Settling Defendants shall implement the activities required under the RA Work Plan. The Settling Defendants shall submit to EPA and the State all plans, submittals, or other deliverables required under the approved RA Work Plan in accordance with the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Settling Defendants shall not commence physical Response Action activities at the Site prior to approval of the RA Work Plan.

Cliff – does this apply when RAWP is attached to CD?

14. The Settling Defendants shall conduct the Response Action to achieve the Performance Standards.

15. Modification of the SOW or Related Work Plans.

a. If EPA determines that modification to the work specified in the SOW and/or in work plans developed pursuant to the SOW is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the response action set forth in the Action Memo, EPA may require that such modification be incorporated in the SOW and/or such work plans, provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the response action selected in the Action Memo.

b. For the purposes of this Paragraph 15 and Paragraphs 52 and 53 only, the "scope of the response action selected in the Action Memo" is the Response Action as defined in Section IV of this Consent Decree. For the purposes of this Paragraph 15 and Paragraphs 52 and 53 only, the "scope of the response action selected in the Action Memo" does not include implementation by the State of the BPRP on former railroad rights-of-way within residential yard areas at the Site.

c. If Settling Defendants object to any modification determined by EPA to be necessary pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XIX (Dispute Resolution), Paragraph 70 (record review). The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

d. Settling Defendants shall implement any work required by any modifications incorporated in the SOW and/or in work plans developed pursuant to the SOW in accordance with this Paragraph.

e. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

16. Settling Defendants acknowledge and agree that nothing in this Consent Decree, the SOW, or the RA Work Plan constitutes a warranty or representation of any kind by Plaintiffs that compliance with the work requirements set forth in the SOW and ~~that~~ the RA Work Plan will achieve the Performance Standards. However, the Parties anticipate that compliance with those work requirements in good faith will achieve the Performance Standards.

17. a. Settling Defendants shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed ten (10) cubic yards.

(1) The Settling Defendants shall include in the written notification the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Settling Defendants shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

(2) The identity of the receiving facility and state will be determined by the Settling Defendants following the award of the contract for Response Action construction. The Settling Defendants shall provide the information required by Paragraph 17.a as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Settling Defendants shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. § 300.440. Settling Defendants shall only send hazardous

substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulations cited in the preceding sentence.

c. Settling Defendants may ship waste material from the Site to the Big Creek Repository at Kellogg, Idaho, and/or to other waste repositories within the Coeur d'Alene Basin Environment as specified by EPA, subject to established waste acceptance criteria.

VII. REMEDY REVIEW

18. Periodic Review. Settling Defendants shall conduct any studies and investigations as requested by EPA, in order to permit EPA to conduct reviews of the areas of the Site where hazardous substances remain to determine whether the Response Action in those areas is protective of human health and the environment at least every five years, consistent with Section 121(c) of CERCLA and any applicable regulations. This five-year period will be coordinated with other periodic reviews carried out for remedial actions within the Bunker Hill Mining and Metallurgical Complex Operable Unit 3.

19. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Response Action is not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

20. Opportunity To Comment. Settling Defendants and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

21. Settling Defendants' Obligation To Perform Further Response Actions. If EPA selects further response actions for the Site, the Settling Defendants shall undertake such further response actions to the extent that the reopener conditions in Paragraph 86 or Paragraph 87 (United States' and State's reservations of liability based on unknown conditions or new information) are satisfied. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the reopener conditions of Paragraph 86 or Paragraph 87 of Section XXI (Covenants Not To Sue by Plaintiffs) are satisfied, (2) EPA's determination that the Response Action is not protective of human health and the environment, or (3) EPA's selection of the further response actions. Disputes pertaining to whether the Response Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 70 (record review).

22. Submissions of Plans. If Settling Defendants are required to perform the further response actions pursuant to Paragraph 21, they shall submit a plan for such work to EPA for

c. execute and record in the appropriate land records office of Shoshone County, State of Idaho, an environmental covenant, running with the land, for such Real Property that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 27.a of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 27.b of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the Response Action to be performed pursuant to this Consent Decree. Such Owner Settling Defendants shall grant the access rights and the rights to enforce the land/water use restrictions to (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) the other Settling Defendants and their representatives, and/or (iv) other appropriate grantees. Owner Settling Defendants shall, within forty-five (45) days of entry of this Consent Decree, submit to EPA for review and approval with respect to such Real Property:

(1) a draft environmental covenant, in substantially the form attached hereto as Appendix E, that is enforceable under the Uniform Environmental Covenants Act and other applicable laws of the State of Idaho, and

(2) a current title insurance commitment or some other evidence of title acceptable to EPA, which shows title to the land described in the covenant to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are approved by EPA or when, despite best efforts, Settling Defendants are unable to obtain release or subordination of such prior liens or encumbrances).

Within fifteen (15) days of EPA's approval and acceptance of the environmental covenant and the title evidence, such Settling Defendants shall record the environmental covenant with the appropriate land records office of Shoshone County. Within thirty (30) days of recording the environmental covenant, Owner Settling Defendants shall provide EPA with a final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded covenant showing the clerk's recording stamps. If the covenant is to be conveyed to the United States, the covenant and title evidence (including final title evidence) shall be prepared in accordance with the U.S. Department of Justice Title Standards 2001, and approval of the sufficiency of title must be obtained as required by 40 U.S.C. § 3111.

28. If the Site, or any other Real Property where access is needed to implement this Consent Decree, is owned or controlled by persons other than any of the Settling Defendants, Settling Defendants shall use best efforts to secure from such persons an agreement to provide access thereto for Settling Defendants, as well as for the United States on behalf of EPA, and the State, as well as their representatives (including contractors), for the purpose of conducting any

activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 27.a of this Consent Decree. However, the State will obtain any access required for implementation of the BPRP. For purposes of this Paragraph 28, "best efforts" includes the payment of reasonable sums of money in consideration of access. If any access agreement required by this paragraph is not obtained within ninety (90) days of the date of entry of this Consent Decree, Settling Defendants shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Settling Defendants have taken to attempt to comply with this paragraph. The United States may, as it deems appropriate, assist Settling Defendants in obtaining access. Settling Defendants shall reimburse the United States in accordance with the procedures in Section XVI (Payments for Response Costs), for all costs incurred, direct or indirect, by the United States in obtaining such access, including, but not limited to, the cost of attorney time and the amount of just compensation actually paid by the United States.

29. Any Real Property on which Settling Defendants will perform or fund Work under this Consent Decree is subject to the requirements of the Basin ICP and the Bunker Hill Area of Drilling Concern as extended by the ROD.

30. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls in addition to the Basin ICP and the Bunker Hill Area of Drilling Concern as extended by the ROD are needed to implement the response actions selected in the Action Memo, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall cooperate with EPA's efforts to secure such governmental controls.

31. Notwithstanding any provision of this Consent Decree, the United States and the State retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

X. REPORTING REQUIREMENTS

32. In addition to any other requirement of this Consent Decree, Settling Defendants shall prepare and submit written reports as set forth in the SOW. Settling Defendants shall submit copies of the reports set forth in the SOW to EPA and to the State according to the schedule set forth in the SOW. If requested by EPA or the State, Settling Defendants shall also provide briefings for EPA and the State to discuss the progress of the Work.

33. The Settling Defendants shall notify EPA of any change in the schedule described in any report for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than seven (7) days prior to the performance of the activity.

h. Any other performance guarantee mechanism suggested by Settling Defendants and acceptable to EPA.

If at any time during the effective period of this Consent Decree, the Settling Defendants provide a Performance Guarantee for completion of the Work by means of a demonstration or guarantee pursuant to Paragraph 47.e or Paragraph 47.f above, such Settling Defendants shall also comply with the other relevant requirements of 40 C.F.R. § 264.143(f), 40 C.F.R. § 264.151(f) and 40 C.F.R. § 264.151(h)(1) relating to these methods unless otherwise provided in this Consent Decree, including but not limited to (i) the initial submission of required financial reports and statements from the relevant entity's chief finance officer ("CFO") and independent certified public accountant ("CPA"), in the form prescribed by EPA in its financial test sample CFO letters and CPA reports available at: http://www.epa.gov/compliance/resources/policies/cleanup/superfund/fa-test-samples.pdf; (ii) the annual re-submission of such reports and statements within ninety (90) days after the close of each such entity's fiscal year; and (iii) the prompt notification of EPA after each such entity determines that it no longer satisfies the financial test requirements set forth at 40 C.F.R. § 264.143(f)(1) and in any event within ninety (90) days after the close of any fiscal year in which such entity no longer satisfies such financial test requirements. For purposes of the Performance Guarantee method specified in this Section XIII, references in 40 C.F.R. Part 264, Subpart H, to "closure," "post-closure," and "plugging and abandonment" shall be deemed to refer to the Work required under this Consent Decree, the terms "current closure cost estimate," "current post-closure cost estimate," and "current plugging and abandonment cost estimate" shall be deemed to refer to the Estimated Cost of the Work, the terms "owner" and "operator" shall be deemed to refer to each Settling Defendant making a demonstration under Paragraph 47.e, and the terms "facility" and "hazardous waste facility" shall be deemed to include the Site.

47.e

48. Settling Defendants have selected, and EPA has approved, as an initial Performance Guarantee, a demonstration pursuant to Paragraph 47.e in the form attached hereto as Appendix F. Within ten (10) days after entry of this Consent Decree, Settling Defendants shall execute or otherwise finalize all instruments or other documents required in order to make the selected Performance Guarantee legally binding in a form substantially identical to the documents attached hereto as Appendix F, and such Performance Guarantees shall thereupon be fully effective. Within thirty (30) days of entry of this Consent Decree, Settling Defendants shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected Performance Guarantee legally binding to the EPA Regional Financial Management Officer in accordance with Section XXVI (Notices and Submissions) of this Consent Decree, with a copy to Clifford J. Villa, Esq., U.S. EPA Region 10, 1200 Sixth Avenue, Suite 900, ORC-158, Seattle, Washington 98101, and to the United States and EPA and the State as specified in Section XXVI (Notices and Submissions).

F

49. In the event that EPA determines at any time that a Performance Guarantee provided by any Settling Defendant pursuant to this Section is inadequate or otherwise no longer

57. Payments for Future Response Costs.

a. Settling Defendants shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan, including BPRP Costs. On a periodic basis, the United States will send Settling Defendants a bill requiring payment that includes a Superfund Cost Organization Recovery Package Imaging Online System ("SCORPIOS") report or similar cost summary in scope and detail which includes direct and indirect costs incurred by EPA and its contractors (including DEQ when it acts as EPA's contractor for the BPRP). Settling Defendants shall make all payments within forty-five (45) days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 58. Settling Defendants shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, EPA Site/Spill ID Number 109J, and DOJ Case Number _____. Settling Defendants shall send the check(s) to:

U.S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, Missouri 63197-9000

For BPRP Costs, this report or cost summary will be the DEQ report described in Paragraph 11.c.

b. At the time of payment, Settling Defendants shall send an email to the EPA Project Coordinator and to acctsreceivable.cinwd@epa.gov providing notice that payment has been made. Notice shall also be mailed to the following addresses:

EPA Cincinnati Finance Office
MS-NWD
26 Martin Luther King Drive
Cincinnati, Ohio 45268

c. The total amount to be paid by Setting Defendants pursuant to Paragraph 57.a shall be deposited in the Wallace-Mullan Branch Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Coeur d'Alene Basin Environment, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

d. Settling Defendants shall reimburse the State for all State Future Response Costs not inconsistent with the National Contingency Plan. The State will send Settling Defendants a bill requiring payment that includes a standard State-prepared cost summary, which includes direct and indirect costs incurred by the State and its contractors on a quarterly basis. Settling Defendants shall make all payments within forty-five (45) days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 57. Settling

58

Defendants shall make all payments to the State required by this Paragraph in the form of a check or checks made payable to DEQ. Settling Defendants shall send the check(s) to:

DEQ, Fiscal Office
1410 N. Hilton
Coeur d'Alene, ID 83706-1253

e. Within 30 days of the Effective Date of this Consent Decree, Settling Defendants shall pay to the State the sum of $ 500827,000870 for use by the State in the implementing the Basin ICP at the Site. Such payment shall be made to the State in manner provided immediately above.

f. The Parties acknowledge that in implementing this Decree, each Plaintiff intends to perform oversight of the Settling Defendants' performance of the Work. In carrying out their oversight responsibilities under this Decree, EPA and the State shall coordinate with one another and make good faith efforts not to duplicate oversight and other response activities for which they may seek reimbursement of costs under this Paragraph. By avoiding the unnecessary duplication of activities, the Plaintiffs intend to reduce the incurrence of Future Response Costs.

58. Settling Defendants may contest payment of any Future Response Costs, including BPRP Costs, under Paragraph 57 if they determine that the United States or the State has made an accounting error, if they allege that a cost item that is included represents costs that are inconsistent with the NCP, or if they allege that a cost item that is included represents work performed by DEQ or EPA in areas outside the scope of the Action Memo and EE/CA as referenced in Paragraph 11f or this Consent Decree. Such objection shall be made in writing within forty-five (45) days of receipt of the bill and must be sent to the United States (if the United States' accounting is being disputed) or the State (if the State's accounting is being disputed) or to both (if BPRP cost accounting is being disputed) pursuant to Section XXVI (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendants shall within the forty-five (45) day period pay all uncontested Future Response Costs to the United States or the State in the manner described in Paragraph 57. Simultaneously, the Settling Defendants shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Idaho and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Settling Defendants shall send to the United States and the State, as provided in Section XXVI (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Settling Defendants shall initiate the Dispute Resolution procedures in

(1) conditions at that portion of the Site, previously unknown to Plaintiffs, are discovered, or

(2) information, previously unknown to Plaintiffs, is received, in whole or in part, with respect to that portion of the Site,

and these previously unknown conditions or this information, together with any other relevant information, indicate that the Response Action for that portion of the Site is not protective of human health or the environment. Except as otherwise provided in this Paragraph or elsewhere in this Consent Decree, the Settling Defendants reserve all defenses they may have with regard to any actions taken by Plaintiffs under this Paragraph.

88. For purposes of Paragraph 86, the information and the conditions known to Plaintiffs shall include only that information and those conditions known to Plaintiffs as of the date of lodging of this Consent Decree. For purposes of Paragraph 86, information and conditions known to Plaintiffs shall include information and conditions: (i) included in the EE/CA for the Site and its attachments, the Action Memo for the Site, the administrative record supporting the Action Memo, the administrative record and site files for the Wallace-Mullan Branch Right-of-Way and associated recreational trail, the administrative record and site files for the Bunker Hill Superfund Site, the administrative record and site files for the Basin Wide RI/FS and ROD, and any written information submitted to and received by the Plaintiffs' Project Coordinators prior to the date of lodging of this Consent Decree; (ii) included in or developed or reviewed pursuant to the natural resource damages assessment(s) conducted by the United States and/or the Coeur d'Alene Tribe (including but not limited to preassessment screen(s), assessment plan(s), injury determination(s), injury quantification(s), restoration plans, damages analyses or determinations, or report(s) of assessment); (iii) included in expert reports or in the administrative record(s) or site file(s) for the natural resource damages assessment(s) and/or the Basin Wide RI/FS and ROD; (iv) included in the SOW; (v) submitted to the Surface Transportation Board to satisfy the environmental conditions referenced in Paragraph 13 of the Consent Decree in *U.S. v. Union Pacific Railroad*, (D. Idaho), Case No. CV 99-606-N-EJL, and *Coeur d'Alene Tribe v. Union Pacific Railroad, et al.*, (D. Idaho), Case No. CV 91-0342-N-EJL; (vi) obtained by Plaintiffs through depositions, written interrogatories, or requests for admission in *U.S. v. ASARCO Inc., et al.*, (D. Idaho), Case No. CV 96-0122-N-EJL, or *Coeur d'Alene Tribe v. Union Pacific Railroad, et al.*, (D. Idaho), Case No. CV 91-0342-N-EJL; (vii) included in data from reports and records of the State's BPRP; or (viii) included in reports or data from the Silver Valley Natural Resource Trustees' removals in the Ninemile Creek and the Canyon Creek drainages. For purposes of Paragraph 87, the information and the conditions known to Plaintiffs shall include only that information and those conditions known to Plaintiffs as of the date of the respective Certification of Completion of the Response Action for Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek. For purposes of Paragraph 87, information and conditions known to Plaintiffs shall include information and conditions: (i) included in the EE/CA for the Site and its attachments, the Action Memo for the Site, the administrative record

As to the State:

Nick Zilka
State Project Coordinator
Idaho Dept. of Environmental Quality
Kellogg Superfund Project Office
1005 W. McKinley
Kellogg, ID 83837
Phone: (208) 783-5781
Email: Nicholas.Zilka@deq.idaho.gov

As to the Settling Defendants:

~~[Name]~~ Sara Handy
Settling Defendants' Project Coordinator
~~[Address]~~ Arcadis
1687 Cole Blvd., Suite 200
Lakewood, CO 80401
and
Union Pacific Railroad Company
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DRAFT
CONFIDENTIAL SETTLEMENT COMMUNICATION
SUBMITTED UNDER FRE 408
NOT ADMISSIBLE IN EVIDENCE

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States and State of Idaho v. Union Pacific Railroad Company and BNSF Railway Company*, relating to the Wallace Yard and Spur Lines Site.

FOR UNION PACIFIC RAILROAD COMPANY

_____
Date

_____
Signature: _____
Name (print): _____
Title: _____
Address: _____

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): Robert W. Lawrence
Title: Legal Counsel
Address: Davis Graham & Stubbs LLP
1550 Seventeenth St, Suite 500
Denver, CO 80202
Ph. Number: 303-892-9400